

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-30857

DJ ENTERPRISES, LLC
d/b/a A & W

Debtor

MEMORANDUM ON MOTION TO DISMISS

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

DJ Enterprises, LLC, holding itself out as a limited liability company, filed a Voluntary Petition under Chapter 11 on February 22, 2001. John Dale Trotter, representing himself as the "Managing Member," signed the Voluntary Petition. The List of Equity Security Holders filed with the Voluntary Petition identifies John Dale Trotter and Dean Humphrys each as a "50% member" of DJ Enterprises, LLC.

Presently before the court is the Motion to Dismiss Chapter 11 Case, or in the Alternative, for Conversion or Appointment of Trustee (Motion to Dismiss) filed by First Tennessee Bank National Association (First Tennessee) on February 27, 2001. By its Motion, First Tennessee requests dismissal of DJ Enterprises, LLC's Chapter 11 case, or alternatively, that the case be converted to Chapter 7 or a trustee be appointed. First Tennessee's request for dismissal is grounded upon the fact that DJ Enterprises, LLC failed to file "articles of organization" with the Tennessee Secretary of State and therefore has not obtained the status of a limited liability company under Tennessee law. DJ Enterprises, LLC does not dispute that the "articles of organization" have not been filed.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

The Tennessee Limited Liability Company Act is enacted at TENN. CODE ANN. §§ 48-201-101 through 48-248-606 (1995 & Supp. 2000). Section 48-202-101 provides in material part:

(2) "Articles" or "articles of organization" means in the case of an LLC organized under Chapters 201-248 of this title, articles of organization, articles of amendment, articles of correction, certificates of merger, and all similar documents required to be filed with any of the foregoing as part of the formation and continuation of an LLC.

TENN. CODE ANN. § 48-202-101(2) (Supp. 2000).

Section 48-203-102 provides in material part:

(a) One (1) or more individuals may, acting as organizers, form an LLC, by filing with the secretary of state articles for the LLC which contain the information required by § 48-205-101 and admitting the initial members. Unless a delayed effective date is specified in the articles, the LLC is formed and its existence begins when the articles are filed with the secretary of state.

TENN. CODE ANN. § 48-203-102(a) (Supp. 2000).

Section 109 of the Bankruptcy Code, with exceptions not material here, provides that only a "person" may be a debtor under Chapter 7 or Chapter 11. See 11 U.S.C.A. § 109(d) (West 1993). "Person" is defined under the Bankruptcy Code to include only individuals, partnerships, corporations, and certain governmental units. See 11 U.S.C.A. § 101(41) (West Supp. 2000). Clearly, DJ Enterprises, LLC is not an individual or a governmental unit. Accepting that a limited liability company is eligible to be a debtor under Chapter 7 or Chapter 11 notwithstanding that it does not meet the definition of a "corporation" or "partnership," DJ Enterprises, LLC is not a limited liability company under Tennessee law. It is not, therefore, eligible to be a debtor under Chapter 11.

II

DJ Enterprises, LLC posits that First Tennessee, identified by DJ Enterprises, LLC as a secured creditor, does not have standing to contest its legal existence. The court disagrees. See *In re Donald Verona & Bernard Green*, 126 B.R. 113 (Bankr. M.D. Fla. 1991); *In re Tonic Mfg. Co., Inc.*, 101 B.R. 317 (Bankr. M.D. Fla. 1989). Furthermore, the court may raise the eligibility issue *sua sponte*. See *In re Estate of Patterson*, 64 B.R. 807, 808 (Bankr. W.D. Tex. 1986) (*Sua sponte* dismissal appropriate “where it is clear as a matter of law that [the] Court can have no jurisdiction over [the] Debtor.”).

DJ Enterprises, LLC also contends that it should be deemed a general partnership and allowed to proceed with this Chapter 11 case. Pursuant to Rule 1004(a) of the Federal Rules of Bankruptcy Procedure, a voluntary petition on behalf of a partnership requires that “all general partners consent to the petition.” FED. R. BANKR. P. 1004(a). In the present case, only John Dale Trotter signed the Voluntary Petition. The second alleged partner, Dean Humphrys, did not sign. The Debtor argues that Mr. Humphrys has been enjoined from participating in the management of DJ Enterprises, LLC by the Circuit Court for Sevier County, Tennessee, and could not, therefore, consent to the filing of its Voluntary Petition.

Under Tennessee law, a partnership, by definition, is “an association of two (2) or more persons to carry on as co-owners a business for profit” TENN. CODE ANN. § 61-1-105(a) (Supp. 2000). Notwithstanding that Mr. Humphrys may be prohibited from participating in the management of DJ Enterprises, LLC, the court has nothing before it to suggest that Mr. Humphrys

ceased to be a partner or that he has consented to the filing of this Chapter 11 case. The court will not ignore Rule 1004(a) to allow Mr. Trotter to unilaterally commence this bankruptcy case on behalf of an alleged partnership.

Finally, DJ Enterprises, LLC, relying on *In re Memphis-Friday's Assocs.*, 88 B.R. 821 (Bankr. W.D. Tenn. 1988), asks the court to treat its petition as an involuntary case filed pursuant to 11 U.S.C.A. § 303(b)(3) (1993). The court declines to so act.

For the reasons stated above, First Tennessee's Motion to Dismiss will be granted. An appropriate order will be entered.

FILED: March 16, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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O R D E R

For the reasons stated in the Memorandum on Motion to Dismiss filed this date, the court directs that the Motion to Dismiss Chapter 11 Case, or in the Alternative, for Conversion or Appointment of a Trustee, filed by First Tennessee Bank National Association on February 27, 2001, is, to the extent dismissal of this bankruptcy case is sought, GRANTED. This Chapter 11 case is DISMISSED.

SO ORDERED.

ENTER: March 16, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE